IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

CRP.No. 1145 of 2005(D)

CMA.1300/2002 of DISTRICT COURT, THODUPUZHA
I.A. NOS. 1096/2001 & 1097/2001 IN OS.57/1999 of SUB COURT,KATTAPPANA

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REVN. PETITIONER: APPELLANT

1. STATE OF KERALA, REP. BY THE CHIEF SECRETARY, GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER, PWD (ROAD AND BUILDING), CENTRAL CIRCLE, ALWAYE, ERNAKULAM DIST.

3. THE EXECUTIVE ENGINEER, P.W.D. (ROADS) DIVISION, IDUKKI.

BY ADV. SRI. R. BINDU, GOVERNMENT PLEADER

RESPONDENTS: RESPONDENT

1. RON SECURITIES AND SERVICES, A FIRM REGD. UNDER THE INDIAN PARTNERSHIP ACT 1932 WITH ITS PRINCIPAL PLACE OF BUSINESS AT KARIMKUNNAM IN KARIMKUNNAM VILLAGE,THODUPUZHA TALUK,THE PLAINTIFF FRIM IS REP.HEREIN BY JOSE.T,AMUMTHURUTHIL,43 YRS,S/O.THO MAS, AMUMTHURUTHIL HOUSE,VENGALLOOR.P.O,THODUPUZHA WHO IS THE MANAGING PARTNER OF THE PLAINTIFF FIRM.

2. A.XAVIERKUTTY, S/O.CHACKO, AGED ABOUT 58 YEARS, RESIDING AT ANDUMALY HOUSE, VILLOONNI.P.O, KOTTAYAM-8, ARPOOKARA VILLAGE, KOTTAYAM TALUK, KOTTAYAM DIST.

3. P.S.AJAYAKUMAR, S/O.SUKUMARAN, AGED 33, RESIDING AT PUTHENPURACKAL HOUSE, KATTAPPANA KARA, KATTAPPANA VILLAGE, UDUMBANCHOLA TALUK, IDUKKI DIST.

BY ADV. SRI.RAJU K.MATHEWS for R1
SRI.G.SASIDHARAN CHEMPAZHANTHIYIL for R2
SRI.S.VISHNU

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 21/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.N. KRISHNAN , J

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C.R.P NO. 1145 OF 2005

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Dated this the 21st day of August, 2007.

JUDGMENT

This revision petition is preferred against the order of the District Judge, Thodupuzha in C.M.A. No. 1300/2002 whereby he confirmed the order of the Subordinate Judge, Kattappana in I.A. Nos. 1096/2001 and 1097/2001 in O.S. No.57/1999. The suit was filed for realisation of the money due from the defendants. The court passed an ex parte decree on 09.03.2001 whereby it allowed recovery of Rs.50,000/- from the 5th defendant, refused relief against the other defendants but directed the defendants 1 to 3 to release forthwith an amount of Rs.8 lakhs kept in the suspense account unless it is subjected to any court orders or attachment. With a delay of 215 days as noted by the government and 232 days as noted by the District Judge an application to set aside the ex parte decree filed by the 3rd defendant namely the executive engineer in the suit. The ground alleged are that the statement of facts were prepared and entrusted to the Additional Government Pleader Sri. Thomas Perumana and because of his over sight, the written statement could not be filed within time. He had resigned and the successor advocate did not take

serious note of the matter and failed to file the written statement. Defendants 1 to 3 were set ex parte on 30.01.2001. PW1 was examined and he had deposed in tune with the pleadings but the court below did not accept his evidence and held that the delay has not been properly explained. The appellate court also confirmed the view of the court below. The learned counsel for the respondents in the revision petition could contend for the position that there is no decree against the government and therefore there cannot be any grievance for them. It is also contended that the release of the amount lying in suspense account had been protected by the decree itself and therefore it is also not a ground and lastly the materials available and the evidence adduced are not satisfactory to condone the delay. The question of condoning the delay and setting aside the ex parte decree had been the subject matter of so many decisions of this Court as well as the apex court. It is true that delay shall not be condoned as a routine matter and ex parte decree cannot be set aside for a mere asking. The apex court had laid down the principles regarding the condonation of delay in the decision reported in **(Collector, Land Acquisition, Anantnag v. Katiji)** AIR 1987 Supreme Court 1353 that ordinarily a litigant does not stand to benefit by lodging an appeal late. It is also

stated that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of non-deliberate delay. It must be grasped that judiciary is respected not on account of its power to leagalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. When this approach is necessary in the case of a private litigant the court should not adopt a step motherly attitude to the State Government. The apex court also took note of the difficulties that may have to be faced by the state because of non-individual personal responsibility of a person dealing with the governmental matters. Here, the reason averred is that instructions were given to former Government Pleader but did not file the written statement and the subsequent Government Pleader did not take serious note of it. It is contended that more than 31 lakhs is due from the contractor and P.W.D has got lien over the amount which is lying in the suspense account. So though it is in the form of directions the observations make it clear that it substantially affects the right of the government. The courts below had highly technical and they have not adopted broader principles of natural justice in this case. I will

also refer to the decision of this Court in **Plantation Corporation of Kerala Ltd. v. Hussain** (1998 (1) KLT 1008) where this Court quoted exhaustively from the decision of a single judge reported in **Sreedhara Kurup v. Mickel** (1968 KLT 599) this Court held that the touch stone in a case under Order IX Rule 9 C.P.C is the presence of sufficient cause for non appearance. The broad principle of natural justice that informs our judicial institution is that a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part. Then proceeded on to held that if some steps have been taken and application for restoration has been made with some deligence and some evidence adduced making out a sufficient cause for absence, restoration should be ordered, minor misconduct or laches being corrected by the common curative of costs. From the above enunciated principles referred to above it would show that when it is proved that a party is not grossly negligent or guilty of grave misconduct then the court should give a chance for fair hearing to the parties concerned. The 3rd defendant, executive engineer has sworn to affidavit. He has mounted the box and there may be discrepancies here and there but the object of his evidence is to preserve the governmental interest and therefore I

consider it as a fit case where the courts below should have condoned the delay and set aside the ex parte decree so far as it related to defendants 1 to 3 are concerned. Since the other defendants had not come forward, the question of setting aside the ex parte decree against them does not arise and lastly it is not inseparable decree whereby the decree becomes unexexecutable decree against all defendants. Therefore, the C.R.P is allowed and the ex parte decree against defendants 1 to 3 are set aside and the court below is directed to restore the case with respect to these persons and dispose of the matter in accordance with law. It is also made clear that being a suit of 1999 the matter be disposed of as expeditiously and not later than 5 months from today.

M.N. KRISHNAN, JUDGE.

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